United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

KEVIN SULLIVAN, an individual and WHOLESALE WOODFLOOR WAREHOUSE, a Nevada corporation,

Plaintiffs,

v.

LUMBER LIQUIDATORS, INC. a Delaware corporation,

Defendant.
_____/

No. C-10-1447 MMC

ORDER DENYING DEFENDANT'S MOTION TO DISMISS; GRANTING DEFENDANT'S ALTERNATIVE MOTION TO STAY; STAYING ACTION PENDING RESOLUTION OF ARBITRATION; VACATING MAY 28, 2010 HEARING

Before the Court is defendant Lumber Liquidators, Inc.'s ("Lumber Liquidators"), Motion to Dismiss or, in the Alternative, to Stay Pending Arbitration, filed April 22, 2010. Plaintiffs Kevin Sullivan ("Sullivan") and Wholesale Woodfloor Warehouse have filed opposition, to which Lumber Liquidators has replied. Having read and considered the papers filed in support of and in opposition to the motion, the Court deems the matter appropriate for determination on the parties' written submissions, hereby VACATES the May 28, 2010 hearing, and rules as follows.

BACKGROUND

This case involves a dispute over a family business. Sullivan's eldest brother, Tom Sullivan, is the founder and chairman of Lumber Liquidators, a publicly traded company

with approximately 195 retail stores located throughout the United States. (See FAC ¶ 5.) Sullivan was an employee of Lumber Liquidators from 1997 until December 11, 2008. (See Declaration of Kevin H. Sullivan ("Sullivan Decl.") ¶ 2.)

In 1998, Sullivan and Lumber Liquidators executed a stock option agreement. (See FAC ¶ 8.) A dispute over the terms of the 1998 stock option agreement resulted in a mediation between the parties in 2005. (See FAC ¶ 8). The mediation, in turn, resulted in Sullivan and Lumber Liquidators' entering into a Confidential Release and Settlement Agreement ("the Settlement Agreement") on August 1, 2005. (See id.; see also Declaration of Farhad Aghdami ("Aghdami Decl.") ¶ 2.) In conjunction with the Settlement Agreement, Sullivan and Lumber Liquidators also entered into (1) an Employment, Confidentiality, and Non-Competition Agreement (the "Employment Agreement") (see Declaration of E. Livingston B. Haskell, filed April 22, 2010, ("Haskell Decl.") ¶ 3, Ex. 1A) and (2) a Stock Option Agreement (the "Option Agreement") (see Haskell Decl. ¶ 3, Ex. 1B). The Settlement Agreement, the Employment Agreement, and the Option Agreement all contain choice-of-law provisions, selecting the law of the Commonwealth of Massachusetts, and provide for arbitration in Boston, Massachusetts. (See Haskell Decl. ¶ 5, Ex. 1 ¶¶ 9, 10; id. Ex. 1A ¶ 18, Ex. 1B ¶ 17.)

The Employment Agreement prohibits Sullivan from (1) competing directly with Lumber Liquidators for a period of two years following the end of his employment with Lumber Liquidators (see Haskell Decl. Ex. 1A ¶ 7), (2) inducing Lumber Liquidators' employees to terminate their relationships with Lumber Liquidators (see Haskell Decl. Ex. 1A ¶ 6(b)), and (3) using, disclosing, or copying confidential information (see Haskell Decl. Ex. 1A ¶ 8). Additionally, the Employment Agreement contains an express provision ("the Arbitration Provision") that all disputes "arising out of or concerning the interpretation or application of" said Agreement "shall be resolved timely and exclusively by final and binding arbitration." (See Haskel Decl. Ex. 1A ¶ 18.) Sullivan was represented by his own counsel for the mediation as well as the negotiation and execution of the Settlement Agreement, the Employment Agreement, and the Option Agreement. (See Affidavit of E. Livingston B.

Haskell, filed May 14, 2010 ("Haskell Aff.") ¶ 5; see also Aghdami Decl. ¶¶ 6-11, Exs. 1, 2.)

In December 2007, after Lumber Liquidators' initial public offering of its stock, Sullivan demanded arbitration with Lumber Liquidators in Boston, Massachusetts, over a dispute regarding the amount of compensation he was due under the Option Agreement. (See Haskell Aff. ¶ 7.) In 2008, Sullivan filed a civil lawsuit against Lumber Liquidators and several of its executives in Massachusetts Superior Court. (See Haskell Aff. ¶ 8.) The substance of Sullivan's civil suit was later added to the arbitration. (See id.) At the conclusion of the arbitration, the arbitrator awarded Sullivan an after-tax total of 529,027 shares of Lumber Liquidators stock, which shares are currently worth over $15 million. (See Haskell Aff. ¶ 9.)

On December 11, 2008, Lumber Liquidators terminated Sullivan's employment. (See Declaration of Robert Morrison ("Morrison Decl.") ¶¶ 13-15.) On the day of his termination, Sullivan refused to return his company-issued laptop. (See Morrison Decl. ¶¶ 16-21.) According to Lumber Liquidators, Sullivan later returned the laptop but copied its contents before doing so. (See Morrison Decl. ¶ 23.) Thereafter, on January 20, 2009, Sullivan founded a retail flooring business known as Wholesale Woodfloor Warehouse, which directly competes with Lumber Liquidators. (See Sullivan Decl. ¶ 7, Exs. B, C). Wholesale Woodfloor Warehouse is a Nevada Corporation that presently operates retail stores in Long Beach and Sacramento, California. (See FAC ¶ 3.)

On March 5, 2010, Lumber Liquidators filed an arbitration demand with the American Arbitration Association ("AAA"), seeking damages for alleged breach of the Employment Agreement based on the above-referenced actions on the part of Sullivan ("the Arbitration"). (See Sullivan Decl. ¶ 9; see also Haskell Decl. Ex. 4.) Thereafter, on March 15, 2010, Lumber Liquidators filed a civil action in Massachusetts Superior Court, seeking interim relief pending resolution of the Arbitration. (See Sullivan Decl. ¶ 10, Ex. E; see also Haskell Decl. Ex. 6.) On April 1, 2010, Sullivan filed in California, in San Francisco Superior Court, a complaint for injunctive relief, seeking to enjoin Lumber Liquidators from enforcing the non-competition clause contained in the Employment Agreement, and, on

April 5, 2010, a First Amended Complaint ("FAC") was filed, adding Sullivan's corporation, Wholesale Woodfloor Warehouse, as a party plaintiff to said action. (See Declaration of E. Livingston B. Haskell in Support of Removal, filed April 6, 2010, Ex. A.) On April 6, 2010, Lumber Liquidators removed the action to federal district court on the basis of diversity jurisdiction, pursuant to 28 U.S.C. § 1332. (See id.)

LEGAL STANDARD

Under the Federal Arbitration Act ("FAA"), arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." See 9 U.S.C. § 2. The FAA "not only placed arbitration agreements on equal footing with other contracts, but established a federal policy in favor of arbitration." See Circuit City Stores, Inc. v. Adams, 279 F.3d 889, 892 (9th Cir. 2002).

In determining the validity of an arbitration agreement, federal courts "'apply ordinary state-law principles that govern the formation of contracts.'" See id. at 892 (quoting First Options of Chicago, Inc. v. Kaplan, 514 U.S. 938, 944 (1995)). Thus, "general contract defenses such as fraud, duress, or unconscionability, grounded in state contract law, may operate to invalidate arbitration agreements." Circuit City, 279 F.3d at 892.

DISCUSSION

Sullivan does not dispute that he is a party to the Employment Agreement or that his claims fall within the scope of the Arbitration Provision contained therein. Rather, Sullivan argues, the Arbitration Provision is unenforceable. Specifically, Sullivan argues that the choice-of-law provision contained in the Employment Agreement is, by its terms, applicable only in the context of an arbitration or, at best, is ambiguous in that respect, and that even if the choice-of-law provision is deemed applicable to the entire agreement, California law applies to the instant action and the Arbitration Provision is unenforceable under California law as unconscionable and in violation of California public policy. Lumber Liquidators, by contrast, argues that Massachusetts law governs the Employment Agreement in its entirety

and that, in any event, the Arbitration Provision is enforceable under California law.[1]

As discussed below, even assuming California law applies, Sullivan fails to show the Arbitration Provision is unconscionable or otherwise unenforceable thereunder.

A. Unconscionability

"California law, like federal law, favors enforcement of valid arbitration agreements." See Armendariz v. Found. Health Psychcare Servs., Inc., 24 Cal. 4th 83, 97 (2000). "[U]nder both federal and California law, arbitration agreements are valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the [rescission] of any contract." See id. at 98 & n.4.

A party moving for arbitration "bears the burden of proving the existence of a valid arbitration agreement by the preponderance of the evidence, and a party opposing the [motion] bears the burden of proving by a preponderance of the evidence any fact necessary to its defense." See Bruni v. Didion, 160 Cal.App. 4th 1272, 1282 (2008) (internal quotation and citation omitted). Unconscionability is one of several grounds upon which a contract, including a contract to arbitrate, may be found unenforceable. See Cal. Civ.Code § 1670.5(a); see also Szetela v. Discover Bank, 97 Cal.App. 4th 1094, 1099 (2002). Consequently, the party opposing arbitration has the burden of proving the arbitration provision is unconscionable. See id.

Unconscionability includes both a "procedural" and a "substantive" element. See Armendariz, 24 Cal. 4th at 114. The focus of the procedural element is on "oppression" or "surprise." See id. "'Oppression' arises from an inequality of bargaining power which results in no real negotiation and 'an absence of meaningful choice.'" A & M Produce Co. v. F.M.C. Corp., 135 Cal.App. 3d 473, 486 (1982) (internal quotation and citation omitted). "'Surprise' involves the extent to which the supposedly agreed-upon terms are hidden in a prolix printed form drafted by the party seeking to enforce them." Id. "The procedural element of an unconscionable contract generally takes the form of a contract of adhesion."

[1] Sullivan makes no argument that the Arbitration Provision would be considered unconscionable or otherwise unenforceable under Massachusetts law.

See Discover Bank v. Superior Court of L.A., 36 Cal. 4th 148, 160 (2005). Substantive unconscionability focuses on whether the contract or provision thereof leads to "overly harsh" or "one-sided" results. See Armendariz, 24 Cal. 4th at 114. To be unenforceable, a contract must be both procedurally and substantively unconscionable. See id.

California courts apply a "sliding scale" analysis in making determinations of unconscionability: "the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." See Davis v. O'Melveny & Myers, 485 F.3d 1066, 1072 (9th Cir.2007) (quoting Armendariz, 24 Cal. 4th at 99). Thus, although both procedural and substantive unconscionability must be present for the contract to be declared unenforceable, they need not be present to the same degree. See Harper v. Ultimo, 113 Cal.App. 4th 1402 (2003).

The validity of an arbitration clause, absent an express agreement "clearly and unmistakably" reserving such issue for the arbitrator, is a question of law to be resolved by the court. See Howsam v. Dean Whitter Reynolds, Inc., 537 U.S. 79, 83 (2002); Bruni, 160 Cal.App. 4th at 1283, 1286-88. Here, neither party has identified such an agreement. Accordingly, the Court next turns to the question of unconscionability. In determining that issue, the Court "sits as a trier of fact, weighing all the affidavits, declarations, and other documentary evidence, as well as oral testimony received at the court's discretion, to reach a final determination." See id. (citing Engalla v. Permanente Medical Group, Inc., 15 Cal. 4th 951, 972 (1997).

1. Procedural Unconscionability

Sullivan argues the Arbitration Provision of the Employment Agreement is procedurally unconscionable (1) because Sullivan was required by Lumber Liquidators to execute the agreement "as a condition of continued employment and to receive deferred compensation" (see Pl.'s Opp'n at 9:15-22) and (2) because the Arbitration Provision "incorporates by reference the National Rules for the Resolution of Employment Disputes of the American Arbitration Association ("AAA Rules") and fails to attach the rules for

Sullivan's review, or to specify which version of the rules will apply." (See Pl.'s Opp'n at 9:14-10:2). The Court finds Sullivan's arguments unpersuasive.

First, Sullivan fails to aver or otherwise offer evidence to demonstrate he had no opportunity to negotiate the terms of the Arbitration Provision. Rather, he states he "did not negotiat[e] the terms of the arbitration clause in paragraph 18." (See Sullivan Decl. ¶ 6.) Such statement is, at best, ambiguous, particularly in light of the uncontroverted evidence that Sullivan was represented by counsel in the negotiation and execution of all three of the related agreements. (See Haskell Aff. ¶ 5; Aghdami Decl ¶ 6.) Indeed, Lumber Liquidators has offered evidence that Sullivan's counsel "drafted portions of the Employment Agreement on Sullivan's behalf [and] made comments and negotiated changes to the Employment Agreement on Sullivan's behalf." (See Aghdami Decl. ¶¶ 7-10, Exs. 1, 2). Sullivan has submitted no evidence in contradiction thereof.

Moreover, even if Lumber Liquidators insisted on inclusion of the Arbitration Provision, the taking of such position under the circumstances pertaining, namely, in the course of negotiations over a global resolution of the parties' disputes concerning their past and continuing relationship, would not serve to render such provision unconscionable or otherwise unenforceable under California law. Clearly, neither the Employment Agreement nor any provision therein constitutes a contract of adhesion. See Circuit City Stores v. Adams, 279 F.3d 889, 893 (2002) (defining contract of adhesion, under California law, as "standard-form contract, drafted by the party with superior bargaining power, which relegates to the other party the option of either adhering to its terms without modification or rejecting the contract entirely"); see, e.g., Szetela, 97 Cal.App. 4th at 1100 (finding arbitration clause contained in amendment to cardholder agreement constituted procedurally unconscionable "bill stuffer"). Sullivan cites to no authority in which a party's insistence on the inclusion of any particular term in a negotiated agreement, whether such term concerns arbitration or otherwise, has resulted in a finding of procedural unconscionability. Cf. Pokorny v. Quixtar, 601 F.3d 987, 991, 997 (9th Cir. 2010) (upholding finding of procedural unconscionability where form "registration agreement"

contained form arbitration clause; citing prior authority finding "standardized contract" unconscionable).

Sullivan's argument that the Arbitration Provision is procedurally unconscionable because it "merely incorporates by reference" the AAA Rules (see Pl.'s Opp'n at 9:7-13) likewise finds no support in the authority on which Sullivan relies, in this instance, Harper v. Ultimo, 113 Cal.App. 4th 1402, 1406-07 (2003). As Lumber Liquidators points out, the rules at issue in Harper not only were incorporated by reference but also limited the substantive remedies available to the plaintiffs therein, precluding those plaintiffs from "obtaining tort damages, punitive damages, or any other damages otherwise appropriate in a court of law." See id. at 1405. Here, by contrast, Sullivan has made no showing that the AAA Rules referenced by the Employment Agreement limit his available remedies or otherwise restrict the scope of his claims. Nor, as distinguished from Harper, is there any element of surprise. See id. at 1405-06 (noting where customer given "preprinted" contract providing that controversies thereunder were to be settled in accordance with Better Business Bureau Arbitration Rules, "customer must inevitably receive a nasty shock when he or she discovers that no relief is available even if out and out fraud has been perpetrated"); see also Sullenberger v. Titan Health Corp., 2009 WL 1444210, at *8 (E.D. Cal. 2009) (rejecting argument that arbitration agreement was procedurally unconscionable because it "provide[d] that the rules of the American Arbitration Association [would] govern, but [did] not provide a copy of those rules"; noting "plaintiff ha[d] not shown that the [AAA rules], referenced in the arbitration agreement, contain provisions that are unfair or inequitable").

Nor is the Court persuaded by Sullivan's argument that the Arbitration Provision is unenforceable because it does not specify whether the AAA Rules to be applied are to be those in effect at the time of execution or those in effect at the time of any claimed breach. Although the Harper court did find the unfairness resulting from the above-referenced "artfully hidden" limitation on relief was compounded by the potential that the Better Business Bureau's rules might change, the Ninth Circuit, in so finding, observed that those

rules were "not just procedural ones" but, rather, had "the effect of substantively limiting the defendant's exposure." See id. at 1406-07 (emphases in original).

Lastly, Sullivan's argument that the Arbitration Provision is procedurally unconscionable because "there was [no] clear communication" that opting out of the Arbitration Provision "would have no effect on his employment relationship" (see Pl.'s Opp'n at 9:20-22) fares no better. The case on which Sullivan appears to rely for such proposition, Circuit City Stores, Inc. v. Najd, 294 F.3d 1104 (9th Cir. 2002), is distinguishable, as the contract at issue therein was not negotiated. See id. at 1106 (noting employer "distributed packet of materials to the stores employees which included a Dispute Resolution Agreement" containing arbitration clause).

2. Substantive Unconscionability

Sullivan offers no evidence of any overly-harsh or one-sided result arising from the enforcement of the Arbitration Provision. Instead, Sullivan argues that the Arbitration Provision fails to comply with certain requirements established by the California Supreme Court in Armendariz. See Armendariz, 24 Cal. 4th at 102.[2] Sullivan's reliance on such authority is unavailing, however, as Armendariz concerned the arbitration of nonwaivable "statutory civil rights." See id. As discussed therein, when a plaintiff seeks to vindicate nonwaivable statutory rights, such as those created by such anti-discrimination statutes as California's Fair Employment and Housing Act ("FEHA"), the above-referenced requirements serve to ensure that those rights and protections are not dissipated by the lack of a judicial forum. See id. (noting "beneficiaries of public statutes are entitled to the rights and protections provided by law") (internal quotation and citation omitted); see also Mercuro v. Superior Court, 96 Cal.App. 4th 167, 179 (2002) (applying Armendariz

[2] As set forth in Armendariz, in accordance with the "basic principle of nonwaivability of statutory civil rights," an arbitration agreement applicable to a statutory claim of such nature "is lawful if it (1) provides for neutral arbitrators, (2) provides for more than minimal discovery, (3) requires a written award, (4) provides for all types of relief that would otherwise be available in court, and (5) does not require employees to pay either unreasonable costs or any arbitrators' fees or expenses as a condition of access to the arbitration forum." See id. (quoting Cole v. Burns Intern. Security Services, 105 F.3d 1465 (D.C. Cir. 1997).

requirements to arbitration of claims brought under California Labor Code §§ 230.8 and 970). Sullivan cites to no authority holding such requirements are more broadly applicable. Moreover, as set forth below, not only has Sullivan failed to provide legal authority in support of his argument, two of the three factual underpinnings thereof find no support in the instant record.

Sullivan argues the Arbitration Provision (1) "does not require a written award," (2) "does not provide for all types of relief that would otherwise be available in court," and (3) "requires [Sullivan] to 'share equally all costs of arbitration.'" (See Pl.'s Opp'n at 10:21-24.) In that regard, the Court first notes that Sullivan, in support of his first two assertions, neither provides nor cites to any part of the AAA Rules in effect either in 2005[3] or at present. Moreover, the relevant AAA rules, available for judicial notice, require that the arbitrator's award be in writing. See AAA National Rules for the Resolution of Employment Disputes, effective January 1, 2004 ("2004 Rules"), Rule 34.c, available at http://www.adr.org/sp.asp?id=26405#n34 (providing "[t]he award shall be in writing"); AAA Employment Arbitration Rules and Mediation Procedures, effective November 1, 2009 ("2009 Rules"), Rule 39.d, available at http://www.adr.org/sp.asp?id=32904#39, (providing "[t]he award shall be in writing"). Next, Sullivan offers no evidence to support his assertion that the AAA Rules either did not or currently do not provide for all types of relief that otherwise would be available in district court. Indeed, to the contrary, the relevant AAA rules provide for all relief available under the law. See 2004 Rules, Rule 34.d (providing "[t]he arbitrator may grant any remedy or relief that the arbitrator deems just and equitable, including any remedy or relief that would have been available to the parties had the matter been heard in court"); 2009 Rules, Rule 39.d (providing "[t]he arbitrator may grant any remedy or relief that would have been available to the parties had the matter been heard in court including awards of attorney's fees and costs, in accordance with applicable law"). Lastly, although the Arbitration Provision requires the parties to "share equally in all costs of

[3] As noted, the Employment Agreement was executed in August 2005.

arbitration" (see Haskell Decl. Ex. 1A at ¶ 18), Sullivan offers no argument or evidence indicating how such provision would be substantively unconscionable under the circumstances pertaining. See Armendariz, 24 Cal. 4th at 102 (precluding enforcement of arbitration agreement where employee required to pay "unreasonable costs").

3. Conclusion as to Unconscionability

Accordingly, for the reasons stated above, Sullivan has failed to show the Arbitration Provision in the Employment Agreement is unenforceable as unconscionable.

B. Waiver

Sullivan next argues the Arbitration Provision is unenforceable because Lumber Liquidators has waived its right to arbitration.

"[W]here a contract provides that arbitration may be demanded within a stated time, failure to make demand within that time constitutes a waiver of the right to arbitrate." See Platt Pacific, Inc. v. Andelson, 6 Cal. -4th 307, 313 (1993) (denying motion to compel; finding plaintiff had waived right to arbitration by failing to timely demand arbitration pursuant to terms of arbitration agreement).

Here, Sullivan argues Lumber Liquidators has waived its right to arbitration by not making its demand for arbitration "within thirty days of the events alleged." (See Pl.'s Opp'n at 13:7-9.) Sullivan's argument is unpersuasive. As Lumber Liquidators points out, the Arbitration Provision does not require Lumber Liquidators to make a demand for arbitration within thirty days of the events giving rise to Lumber Liquidators' claims, but, rather, requires Lumber Liquidators to make such demand within thirty days of the parties' failure to resolve their dispute through mediation. (See Haskell Decl. Ex. 1A at ¶ 18.)

Specifically, the Arbitration Provision states, in relevant part:

> Prior to arbitration of any dispute, the parties agree to attempt to settle the dispute with the assistance of a mutually agreed upon mediator. If the parties cannot resolve the dispute through mediation, then arbitration must be demanded within 30 calendar days or the time when the demanding party knows or should have known of the event or events giving rise to the claim.

(See id.) (emphasis added).

The Arbitration Provision thus makes clear that attempted mediation of a known dispute is a condition precedent to starting the thirty-day clock for filing a demand for arbitration. Sullivan makes no showing that Lumber Liquidators' demand for arbitration was made more than thirty calendar days after the parties' failure to resolve their dispute through mediation.

Accordingly, Sullivan has failed to show Lumber Liquidators waived its right to arbitration under the Employment Agreement.

C. Available Relief

Lumber Liquidators seeks an order of dismissal on the ground that "the same issues . . . are already before the AAA and the state court" in Massachusetts. (See Def.'s Reply at 9:9-13; see also Haskell Decl. Ex. 6.) In particular, Lumber Liquidators, relying on the Declaratory Judgment Act, 28 U.S.C. § 2201, and Brillhart v. Excess Ins. Co. of America, 316 U.S. 491, 495 (1942), argues, the Court has discretion both to abstain from exercising jurisdiction over and to dismiss the instant action in its entirety. See id. at 494-95 (recognizing district court's discretion as to whether to exercise jurisdiction under Declaratory Judgment Act; setting forth relevant considerations and noting "[g]ratuitous interference with the orderly and comprehensive disposition of a state court litigation should be avoided").

Lumber Liquidators' reliance on the above-referenced authority is misplaced, as Sullivan, by the instant action, seeks not only declaratory relief but also an award of monetary damages. (See FAC at 8:12-14.) Neither the Declaratory Judgment Act nor Brillhart encompasses claims of such nature. See Brillhart, 316 U.S. at 493, 495 (describing suit therein as one for "declaratory judgment"; noting federal court ordinarily should not "proceed in a declaratory judgment suit" where parties litigating same state law issues in state court); see, e.g., Burlington Ins. Co. v. Devdhara, 2009 WL 2901624, at *4 (N.D. Cal. 2009) (declining to abstain under Brillhart where plaintiffs brought damages claims; noting Brillhart "only applies to pure declaratory judgment actions"). Rather, "federal courts may stay actions for damages based on abstention principles, but those

principles do not support the outright dismissal or remand of damages actions." See Quakenbush v. Allstate Ins. Co., 517 U.S. 706, 707 (1996).

Accordingly, the Court declines to dismiss the FAC and will stay the proceedings pending resolution of the Arbitration in the Commonwealth of Massachusetts.

CONCLUSION

For the reasons stated, defendant's motion is hereby GRANTED in part and DENIED in part as follows:

1. To the extent Lumber Liquidators seeks an order dismissing the instant action, the motion is DENIED.

2. To the extent Lumber Liquidators seeks in the alternative an order staying the instant action, the motion is GRANTED and the above-titled action is hereby stayed pending resolution of the above-referenced Arbitration;

3. The parties are directed to file a Joint Status Report no later than December 3, 2010 and every six months thereafter, apprising the Court as to the status of the proceedings in the Massachusetts litigation.

IT IS SO ORDERED.

Dated: June 2, 2010

MAXINE M. CHESNEY
United States District Judge